In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1278

CAROL MUSIC, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

After an evidentiary hearing, the Federal Communications Commission on July 27, 1964, revoked the license and subsidiary communications authorizations of Carol Music, Inc., for FM broadcast station WCLM, Chicago, Illinois (R. 100–102). The ground of the Commission's action was that Carol Music had engaged in serious misconduct which demonstrated its unfitness to be a broadcast licensee. Specifically, it had refused to file with the Commission copies of agreements and other information regarding the operation of its radio facilities required by the Communications Act and the Commission's Rules (R.

218-350—66

101); the uses to which Carol Music had put both its main channel and its sub-carrier frequency departed substantially from the uses it had proposed in its application for renewal of license (R. 101); these proposals had been submitted in bad faith, and for the purpose of misleading the Commission (R. 101); and Carol Music had relinquished effective control over substantial portions of the programs broadcast over the facilities of station WCLM, in violation of the Communications Act and of the Commission's Rules (R. 101).

On December 28, 1964, petitioner appealed to the Court of Appeals for the District of Columbia Circuit (R. 1). Its counsel persistently disregarded the rules of that court, however, particularly with respect to the filing of the Joint Appendix (Pet. 2–9). After prolonged delays, extensions, and defaults (R. 12, 14, 18, 23, 25, 43, 45), the court on August 17, 1965, ordered petitioner to show cause why the appeal should not be dismissed (R. 81). The order was not answered (Pet. 6).

On September 8, 1965, at the request of Carol Music's Chicago counsel (R. 126), a Washington attorney reviewed the case with Carol Music's court of appeals counsel (R. 116, 126). The latter complained, among other things, that Carol Music had not paid him all that was owing to him (R. 126–128). Retention of substitute or additional counsel was discussed with another Washington firm specializing in Federal Communications Commission practice (R. 117, 127–128), but the firm recommended against a change of counsel at that time (R. 117).

Petitioner's representative and its appeal counsel also met with the Clerk of the Court of Appeals (R. 117). The Clerk advised them that the court might still allow the appeal if a proper Joint Appendix was filed (R. 116–117), but nothing was done, and on November 4, 1965 a unanimous panel of the court granted the Commission's motion to dismiss the appeal (R. 113).

Petitioner then retained new counsel, who filed two successive motions to reinstate the appeal (R. 114, 129, 143). The second suggested that the failure to comply with the court's rules might be due to abnormal behavior (caused by illness) of petitioner's former counsel (R. 144). No evidence supporting this suggestion was submitted to the court, however, and the motion was denied on February 3, 1966 (R. 156). The present petition for certiorari, which asks this Court to review the court of appeals' refusal to reinstate the appeal, followed.

Petitioner contends that the court of appeals should have found that its appeal counsel was behaving so abnormally as to deny petitioner its right of counsel. But the only evidence petitioner points to in support of this contention is the failure of counsel to comply with the court of appeals' rules, and the form and content of the papers he filed; no direct evidence concerning counsel's mental health was offered. As to the failure to file the Joint Appendix, the record indicates that the most persistent reasons offered were financial (R. 19–20, 82, 85–86; Supp. R. 366–367); as to the quality of counsel's work product, we do not think it was such as to warrant an inference of mental in-

capacity. In addition, we note that petitioner had the benefit of professional advice on this case from two other Washington law firms, as well as its Chicago counsel.

The court of appeals afforded petitioner all reasonable opportunity to perfect its appeal and present its case on the merits. The court was not required to permit its rules of procedure to be ignored, and the proceeding protracted,[1] indefinitely. See, *e.g., Link* v. *Wabash Railroad Co.*, 370 U.S. 626; *Tucker Products Corp.* v. *Helms,* 171 F. 2d 126 (C.A. 9), certiorari denied, 336 U.S. 938; *United States* v. *Bowen*, 306 F. 2d 620 (C.A. 5), opinion adhered to on rehearing, 310 F. 2d 45. And, certainly, the court below was in the best position to determine whether, on the basis of a charge of mental unfitness against a member of its bar, petitioner was entitled to have the case reopened. Its determination was reasonable and does not warrant further review. The petition for certiorari should therefore be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

HENRY GELLER,
General Counsel,
Federal Communications Commission.

MAY 1966.

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[1] Although the order revoking petitioner's broadcast license was entered on July 27, 1964, petitioner is free under the Commission's ruling to continue to broadcast until the final conclusion of the judicial review proceeding.

U.S. GOVERNMENT PRINTING OFFICE:1966